IN THE

Supreme Court of the United States

Supreme Court, U.S.
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OCTOBER TERM 1980

NO. **79-2058**

GARY L. SILVERNAIL,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
DIVISION ONE, COURT OF APPEALS,
STATE OF WASHINGTON

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SUBJECT INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	8
Conclusion	18
Appendix A	A-1

TABLES OF AUTHORITY

Table of Cases

Almeida-Sanchez v. United States, 413 U.S. 266, 37 L. Ed. 2d 596, 93 S. Ct. 2535 (1973) 12,17

Arkansas v. Sanders, ___ U.S. __, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979). 15

Carroll v. United States, 216 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280 (1925) 15

Davis v. Mississippi, 394 U.S. 721, 22 L. Ed. 2d 676, 89 S. Ct. 1394 (1969) 14

Delaware v. Prouse, 440 U.S. 648, 59 L. Ed. 2d 660, __ S. Ct. __ (1979) 14,17

Dunaway v. New York, ___ U.S. ___, 60 L. Ed. 2d 824, 99 S. Ct. 2248 (1979) 17

Kinard v. State, 335 So. 2d 924 (Ala. 1976) . 16

Page

People v. Blitz, 68 Ill. 2d 287, 369 N.E. 2d 1238, 12 Ill. Dec. 224 (1977), cert. den., 435 U.S. 974. 16

Pettit v. State, 207 Ind. 478, 188 N.E. 784 (1934). 16

State v. Becerra, 111 Ariz. 538, 534 P.2d 734 (1975). 16

State v. Elliott, 605 P.2d 930 (Haw. 1980). . 16

Torres v. Puerto Rico, 442 U.S. 465, 61 L. Ed. 2d 1, 99 S. Ct. 2425 (1979) 9-10

United States v. Martinez-Fuerte, 428 U.S. 543, 49 L. Ed. 2d 1116, 96 S. Ct. 3074 (1976). 8,9,10,13

United States v. Ortiz, 422 U.S. 891, 45 L. Ed. 2d 623, 95 S. Ct. 2585 (1975) 11

Wirwin v. Horall, 85 Cal. App. 2d 497, 193 P.2d 497 (1948) 15-16

Ybarra v. Illinois, __ U.S. __, 62 L. Ed. 2d 238, 100 S. Ct. __ (1979) 18

Constitutional Provisions

U.S. Const. amend. IV 2-3,9,17

Statutes

28 U.S.C. § 1257(3) 3

Other Authority

Model Code of Pre-Arraignment Procedure, § 110.2(2) 10,11,14

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The petitioner, Gary L. Silvernail, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals, Division One, for the State of Washington, entered in this proceeding on January 14, 1980.[1]

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[1]The effective date of the decision is April 3, 1980, at which time petitioner's appellate remedies were exhausted when the State Supreme Court refused further review.

OPINION BELOW

The opinion of the court of appeals, State v. Silvernail, 25 Wn. App. 185, 605 P.2d 1279 (1980), appears in the Appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1980. A timely Motion for Reconsideration was denied February 7, 1980. Thereafter petitioner timely filed a Petition for Review, seeking review of the appellate court decision. Review was denied by the Washington State Supreme Court on April 3, 1980, 93 Wn.2d 1021, terminating the review below. This Petition for Certiorari is timely within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the warrantless search of the petitioner's car at the Fauntleroy road block without probable cause is violative of the United

States Constitution, Fourth Amendment, proscription against unreasonable searches and seizures.

STATEMENT OF THE CASE

This matter arises out of the warrantless search of petitioner's car on December 1, 1977. The events in sequence are as follows:

The complaining witness Stone called the King County Police to report a robbery at his home on Vashon Island, Washington. He reported three men forcibly entered his house and ordered him to open his safe and to surrender items of personal property. He resisted and there was a scuffle between them, during which a gun, carried by one of the intruders, accidentally went off. After the men emptied Stone's safe, they bound him with telephone cord and left. Stone heard them say that "they only had five minutes left", and surmised they would attempt to catch the State ferry which communted between Vashon Island and Fauntleroy in West Seattle. Stone gave this information to the

King County Police. He did not observe the suspect's arrival or departure beyond his front door and there was no further evidence as to where they actually went following this incident, until the illegal search on the ferry.[2]

King County officers at Vashon, acting on Stone's information, advised other officers of possible robbery suspects. A roadblock was set up at the Fauntleroy dock.

The intention of the officers was to conduct a search of each individual and car leaving the ferry. The officers described their function as ". . . to stop cars and look inside them for possible suspects and search the vehicles".[3]

However, that is not what occurred. The officers conducted a general exploratory search on a questionable premise of "probable cause".

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[2]Trial transcripts, 2/23/78, pp. 7-14.

[3]Trial transcripts, 2/27/78, p. 4.

The officers would approach the vehicle drivers and request the keys to conduct a search of the car and trunk. As they approached the petitioner's car, they advised him of their intent and procedure "and at this time he was made aware, as were the other people in the other vehicles of our intentions, what we had to do before he could exit the ferry system".[4]

Each car was therefore searched before the driver was permitted to depart the dock.[5]

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[4]Id. p. 63.

[5]Trial transcript, 2/17/78, p. 20. Detective Hosford testified:

> Q. Now, during the searches, the procedure was to demand the key for the car to get into the trunk and then to open the trunk, is that correct:
>
> A. Yes, sir. I believe that would be close. I never spoke with any drivers, and I didn't hear the actual words that were indicated to the drivers. This was all done by uniformed personnel, and they were instructed to explain to the driver, you know, the reason for the search.

Fifty to one-hundred cars were searched prior to petitioners. Petitioner viewed the searches and procedures which preceded the search of his car.

The County officers had set up a maze of patrol cars through which each car had to pass. The cars were individually ordered halted to conduct the searches.

Detective Edmonds describes the contact with petitioner:

> Officer Max Osborne was in uniform and he was the officer that was talking to the drivers as the cars came off. As the Oldsmobile came off, we stopped it at the east end of the loading ramp. And I heard him explain, as he had been to the other cars, that we were investigating a robbery and for the subject inside the car to turn off the vehicle and hand him the trunk key.
>
> . . .
>
> Q. You heard Officer Osborne explain to him that they wanted to check his vehicle?
>
> A. Right.

Footnote [5] Continued

> Q. Okay. But as far as you were aware, nobody was ever advised they could refuse to consent to the search?
>
> A. No, sir. I am sure that they weren't.

Q. What else did you hear then, if anything?

A. Well, as the car first rolled to a stop, I was on the passenger's side of the car; I looked inside it and determined that there was no one else other than the driver in the vehicle, in the passenger area of the vehicle.

At that time, I walked around to the driver's side of the vehicle and I was approximately at the quarter panel, and at that time I heard the subject in the vehicle say something similar to "the key won't open it", or "the key doesn't work", something to this effect. And then I heard the subject say, "What you are looking for is in the trunk".

. . .

Q. What happened after he said "What you are looking for is in the trunk"?

A. He was asked to exit the car and he was placed under arrest.

As a result of the search and seizure, evidence was located, implicating petitioner in the robbery, and the police obtained a statement thereafter.

Petitioner moved to suppress the fruits of the search and his statements pre-trial upon the issue here asserted. His motion was denied. He was convicted of first degree burglary while armed with

a deadly weapon which was a firearm, from which he appealed. The decision on appeal is before this Court on this petition.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decisions of this Court proscribing warrantless searches of automobiles, absent individualized probable cause.

A. The court below held that there was no basis to focus upon the petitioner's car or person. "[T]he record lacks specific facts to warrant a reasonable suspicion focused on his car" (25 Wn. App. 188).

The probable cause is questionable under the facts for other than a belief that a crime has been committed on Vashon Island.

The decision below impermissibly extends the holding of United States v. Martinez-Fuerte, 428 U.S. 543, 49 L. Ed. 2d 1116, 96 S. Ct. 3074 (1976), by upholding an automobile roadblock search which was not justified by the border search doctrine of Martinez-Fuerte, supra, but rather fell within

the general Fourth Amendment constraints recognized by Torres v. Puerto Rico, 442 U.S. 465, 61 L. Ed. 2d 1, 99 S. Ct. 2425 (1979).

Martinez-Fuerte, supra, limited its approval to "roadblock" type stops, for brief questioning at permanent checkpoints established for the purpose of detecting illegal aliens entering through proximate national borders (48 U.S. at 553). "Our holding today is limited to the types of stops described in this opinion" (428 U.S. at 567).

The search in the case below is controlled by the general Fourth Amendment constraints recognized in Torres v. Puerto Rico, supra. There, Puerto Rico argued that the Court should find the "functional equivalent" of the international border of the United States (61 L. Ed. 2d at 8). This Court held:

> . . . We have not dispensed with the fundamental Fourth Amendment prohibition against unreasonable searches and seizures simply becuase of a generalized urgency of law enforcement. Almeida-Sanchez v. United States, [413 U.S.] at 273-275, 37 L. Ed. 2d 596, 93 S. Ct. 2535; United States v. Di Re, 332 U.S. 581, 595, 92 L. Ed. 210, 68 S. Ct. 222 (1948).

> [T]he grounds for a search must satisfy objective standards which ensure that the invasion of personal privacy is justified by legitimate governmental interests . . . The governmental interests to be served in the detection or prevention of crime are subject to traditional standards of probable cause to believe that incriminating evidence will be found.

Torres, supra, 61 L. Ed. 2d at 8.

B. The court below permitted a broad search well in excess of the nature of the detention permitted in Martinez-Fuerte, supra. The court accepted a standard adopted by the Model Code of Pre-Arraignment Procedure, § 110.2(2) (Proposed Official Draft, 1975), 25 Wn. App. 189-190, which states:

> . . . a law enforcement officer may, if (a) he has reasonable cause to believe that a felony has been committed; and (b) stopping all or most automobiles, trucks, buses or other such motor vehicles moving in a particular direction or directions is reasonably necessary to permit a search for the perpetrator or victim of such felony in view of the seriousness and special circumstances of such felony, order the drivers of such vehicles to stop, and may search such vehicles to the extent necessary to accomplish such purpose. Such action shall be accomplished as promptly as possible under the circumstances.

The search provided for in the Model Code of Pre-Arraignment Procedure is that forbidden in United States v. Ortiz, 422 U.S. 891, 45 L. Ed. 2d 623, 95 S. Ct. 2585 (1975). There, the Court flatly rejects the assertion by the court in Silvernail, 25 Wn. App. at 189-191 that the search provided for in the Model Code sufficiently safeguards the public against the indiscriminate use of roadblock searches.

In Ortiz, this Court remained unpersuaded that the checkpoint established at the discretion of officers in the field, even in contrast with the "roving patrols" would limit to any meaningful extent the officer's discretion to select cars for search:

> . . . this degree of discretion to search private automobiles is not consistent with the Fourth Amendment. A search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the court always has regarded probable cause as the minimum requirement for a lawful search.
>
> . . .
>
> The absence of probable cause makes the search invalid.

422 U.S. at 896-898.

That same evil was addressed in Almeida-Sanchez v. United States, 413 U.S. 266, 37 L. Ed. 2d 596, 93 S. Ct. 2535 (1973), in the case of "roving patrols". There, the government claimed authorization for warrantless searches predicted upon the need to detect and apprehend illegal aliens believed to be present in the vicinity, and statutory authority to so search. The court struck the warrantless automobile searches and rejected the government's claim of justification:

> . . . The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

413 U.S. at 273. There is a "right to free passage without interruption or search unless there is known to a competent official authorized to search probable cause for believing that [a] vehicle[] car[ries] contraband or illegal merchandise" (413 U.S. at 274-275.

C. The roadblock in Silvernail was not confined to a pre-established location, as in Martinez-Fuerte, supra. It was located when and where it was by the police as a function of precisely that kind of discretionary enforcement activity which Martinez-Fuerte distinguished. "Neither the vehicle nor its occupants are searched and visual inspection of the vehicle is limited to what can be seen without a search" (428 U.S. at 558).

Routine checkpoint stops do not intrude on the motoring public in the same fashion as those established in the discretion of the officer in the field:

> . . . the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere.

428 U.S. at 559.

The location of the police roadblock and its operation, as a function of discretionary activity, proscribed in Martinez-Fuerte, supra, was

equally condemned in Delaware v. Prouse, 440 U.S. 648, 661, 59 L. Ed. 2d 660, __ S. Ct. __ (1979). The court held inadmissible evidence obtained in a stop and search without probable cause, detailing such a search as a "seizure" within the meaning of the Fourth Amendment:

> Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.

59 L. Ed. 2d at 673.

The holding in Silvernail is in clear rebellion with earlier pronouncements of this Court. The A.L.I. suggested Model Code of Pre-Arraignment Procedure is a step backward into the dragnet conduct prohibited in Davis v. Mississippi, 394 U.S. 721, 22 L. Ed. 2d 676, 89 S. Ct. 1394 (1969). The use of the Model Code of Pre-Arraignment Procedure suggests the lower court's unwillingness to address the consequence of the constable's error, by adopting a "clear" rule. Justice

Burger and Stevens, concurring in Arkansas v. Sanders, ___ U.S. ___, 61 L. Ed. 2d 235, 247, 99 S. Ct. 2586 (1979) stated:

> The dissent complains that the court does not adopt a "clear" rule, presumably one capable of resolving future Fourth Amendment litigation. That is not cause for lament, however desirable it might be to fashion a universal proscription governing the myriad of Fourth Amendment cases that might arise. We are construing the Constitution, not writing a statute or a manual for law enforcement officers.

An authorization to the police to "stop every automobile on the chance of finding" a criminal in it is "intolerable and unreasonable". Carroll v. United States, 216 U.S. 132, 153-154, 69 L. Ed. 543, 45 S. Ct. 280 (1925).

2. The decision of the court below is in clear conflict with the courts of the many states.

As early as 1948, California condemned the dragnet stopping of automobiles without individual justification:

> However proficient the law enforcement agency may be it does not by virtue thereof acquire ascendency over the law. . . . Where a violation of law necessarily follows, acts

> of administrative officials are not given validity on the theory that "the end justifies the means".

Wirwin v. Horall, 85 Cal. App. 2d 497, 505, 193 P.2d 497 (1948).

The appellate cases appear uniform, and in those circumstances where state supreme courts have been called upon to so rule, the test for the search of an automobile has been limited to that made upon probable cause focused on the particular vehicle. E.g., Pettit v. State, 207 Ind. 478, 188 N.E. 784 (1934); People v. Blitz, 68 Ill. 2d 287, 369 N.E. 2d 1238, 12 Ill. Dec. 224 (1977), cert. den., 435 U.S. 974; Kinard v. State, 335 So. 2d 924 (Ala. 1976); State v. Elliott, 605 P.2d 930 (Haw. 1980); State v. Becerra, 111 Ariz. 538, 534 P.2d 743 (1975).

3. The decision below raises significant and recurring questions relating to the permissible extent of intrusion on motorists to detect and apprehend criminal activity.

> The touchstone of the Fourth Amendment's protection of privacy interests and prohibition against unreasonable searches and seizures is the requirement that such police intrusions be based upon probable cause - "the best compromise that has been found for accommodating the []often opposing interests" in safeguard[ing] citizens from rash and unreasonable interferences with privacy and in seek[ing] to give fair leeway for enforcing the law in the community's protection". Brinegar v. United States, 338 U.S. 160, 176, 69 S. Ct. 1302, 1311, 93 L. Ed. 1879 (1949).

Dunaway v. New York, __ U.S. ___, 60 L. Ed. 2d 824, 99 S. Ct. 2248 at 2254 (1979).

The evolution of law enforcement efforts to utilize a "roadblock exception" to the Fourth Amendment and the context of the case below suggests the need for a reply from this Court on the balance of interests involved.

The extent of a permissible intrusion upon motorists in light of the Fourth Amendment proscription against searches upon less than probable cause has been the concern of this Court from Almeida-Sanchez through Prouse. This Court has lately held that the need for probable cause must be particularized:

> Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

Ybarra v. Illinois, ___ U.S. ___, 62 L. Ed. 2d 238, 245, 100 S. Ct. ___ (1979).

The decision below is void of any requirement for such particularization which such void would be filled by a grant of certiorari to reverse the holding of the lower court with respect to the search described.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the court below.

Respectfully submitted,

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APPENDIX A

Jan. 1980 STATE v. SILVERNAIL

25 Wn. App. 185

[No. 6598-0-1. Division One. January 14, 1980.]

THE STATE OF WASHINGTON, Respondent,

v.

GARY LEROY SILVERNAIL, Appellant.

[1] Searches and Seizures - Automobiles - Roadblock - Individualized Suspicion - Necessity. Despite the absence of a reasonable suspicion focusing upon a particular vehicle, stopping all vehicles at a roadblock to search for suspects, including a search of automobile trunks, is constitutionally permissible if the police have probable cause to believe that a serious felony has been committed and the roadblock presents a reasonable likelihood of success in view of the time elapsed since the crime, the existence of alternate paths of escape, and reliable information concerning the direction of the suspect's flight.

[2] Searches and Seizures - Consent - Request - Miranda Warnings - Necessity. A police officer's request to provide the means necessary to conduct a search does not require Miranda warnings if the request is not designed to elicit a testimonial response.

[3] Burglary - Instructions - Accomplice - Liability - Necessity. When a defendant is charged with first-degree burglary, which under RCW 9A.52.020 includes a coparticipant's acts as an alternate element, the court need not instruct the jury as to the defendant's liability as an accomplice.

[4] Criminal Law - Firearm - Deadly Weapon - Possession by Coparticipant - Effect. A defendant's punishment may be enhanced under RCW 9.41.025 or 9.95.040 based upon the use or possession of a firearm or deadly weapon during the commission of a crime, even if the only person so armed was another participant in the same crime. Under such circumstances, the court need not instruct the jury as to the defendant's status as an accomplice.

[5] Criminal Law - Punishment - Review - Reservation of Grounds - Necessity. A criminal defendant may argue on appeal that his sentence was contrary to law even though he failed to make such a contention in the trial court.

[6] Burglarly - Use of Deadly Weapon - Effect on Punishment - Statutory Provisions. The punishment of a defendant convicted of first-degree burglary may not be enhanced under RCW 9.41.025, which prescribes increased penalties for crimes committed with a firearm, if the information under which the defendant was prosecuted charged possession of a deadly weapon as one alternate means of elevating the crime of burglary to first degree.

NATURE OF ACTION: Prosecution for first-degree burglary while armed with a firearm. The burglary occurred on an island, and the defendant was apprehended during a search of all vehicles departing the next scheduled ferry from the island.

SUPERIOR COURT: The Superior Court for King County, No. 83992, Francis E. Holman, J., on May 17, 1978, entered a judgment on a verdict of guilty and an enhanced sentence based upon the use of a firearm in the commission of the offense.

COURT OF APPEALS: Holding that the roadblock and search were proper under the circumstances, that the trial court's instructions were complete and accurate, but that the sentence should not have been enhanced on the basis of possession of a deadly weapon, the court affirms the conviction but remands for resentencing.

Harvey Grad, for appellant.

Norm Maleng, Prosecuting Attorney, and Mary Kay Barbieri, Deputy, for respondent.

RINGOLD, J. -- Gary Leroy Silvernail appeals a judgement and sentence entered upon a jury conviction of first-degree burglary while armed with a deadly weapon and a firearm. He raises issues concerning a search of his car, the admissibility of a statement, the trial court's instructions and the enhancement of his punishment under RCW 9.41.025.

THE SEARCH AND THE STATEMENT

On December 1, 1977, three men forced their way into the Vashon Island home of Kenneth Stone, held him at gunpoint, beat him about the head and back with their fists and gun, burglarized his safe, and tied and gagged him. During a struggle on the couch, the gun was fired close to Stone's head but nobody was hit. As they were leaving, Stone heard someone ask, "How much time do we have left," and another person responded, "Five minutes." Stone concluded they were going to catch the ferry. After loosening the cords with the help of a neighbor, he phoned the police, told them what happened and described the suspects. These descriptions were forwarded to officers awaiting the arrival of the ferry in Seattle. The descriptions indicated the suspects were armed.

Upon arrival of the ferry, the dock was blocked by police cars so departing cars would have to slow to almost a stop. All cars were stopped and searched for suspects. It was a cold day and two people wearing light clothing and matching the suspects' general description were arrested as they walked off the boat. It was not known at that time whether they were involved in the crime. They were subsequently identified as participants in the burglary.

After about 35 or 40 minutes, Silvernail's car left the ferry and was detained. He was told the officers were investigating a robbery, and he was directed to turn off the vehicle and hand over the trunk key. Silvernail responded by saying that the key would not open the trunk but what they were looking for was in there. He was then placed under arrest. A screwdriver was used to pry open the trunk in a search for other suspects. Nobody was inside the trunk although a suitcase and a shotgun were observed. The trunk was closed, the vehicle was impounded and subsequently searched with Silvernail's written consent. The search uncovered two shotguns, a rifle, jewelry, money, and suspected narcotics items in the trunk. There was also a small automatic in the back seat.

Silvernail contends his detention was illegal because the State did not establish a reasonable suspicion he was involved in criminal conduct and did not prove facts sufficient to justify a dragnet for suspects.

The State argues the record establishes good cause to believe the suspects were on the ferry and were armed and dangerous. It is argued that the societal interest in apprehending them outweighed the invasion of privacy involved in the brief detention of each departing passenger.

We agree with Silvernail that the record lacks specific facts to warrant a reasonable suspicion focused on his car. State v. Lesnick, 84 Wn.2d 940, 530 P.2d 243 (1975); State v. Davis, 12 Wn. App. 32, 527 P.2d 1131 (1974). There was, however, probable cause to believe the suspects were somewhere on the ferry, and individualized suspicion is not always a prerequisite to a constitutional search or seizure. United States v. Martinez-Fuerte, 428 U.S. 543, 560-61, 49 L. Ed. 2d 1116, 1130, 96 S. Ct. 3074 (1976).

Martinez-Fuerte upheld the border patrol's use of reasonably located permanent inland checkpoints to examine and sometimes briefly question the occupants of all passing vehicles. In so holding, the court refused to require the existence of any individualized suspicion that a particular car contained illegal aliens. The public interest in stemming the flow of illegal aliens was held to justify this limited intrusion on the traveling public. Critical to the court's reasoning was the observation that this routine procedure was not subject to the unbridled discretion of a field officer. It thereby minimized the risk of abusive or harassing stops. It also operated visibly to reassure motorists that the stops were duly authorized and believed to serve the public interest. The intrusion on legitimate traffic was brief and minimal. Further detention or any search of a car required consent or probable cause that it contained illegal aliens. United States v. Martinez-Fuerte, supra, 428 U.S. at 559, 567, 49 L. Ed. 2d at 1129, 1133-34; United States v. Ortiz, 422 U.S. 891, 45 L. Ed. 2d 623, 95 S. Ct. 2585 (1975).

Martinez-Fuerte represents an exception to the general rule that "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure." United States v. Martinez-Fuerte, supra, 428 U.S. at 560, 49 L. Ed. 2d at 1130; Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). Individualized suspi-

cion has been required when roving border patrols stop a vehicle, United States v. Brignoni-Ponce, 422 U.S. 873, 45 L. Ed. 2d 607, 95 S. Ct. 2574 (1975), and when officers exercise their authority to randomly stop vehicles for a license or registration check. Delaware v. Prouse, 440 U.S. 648, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979). Unlike Martinez-Fuerte, these cases involved the grave danger of uncontrolled discretion, and that danger outweighed the public interest in the law enforcement activity. Delaware v. Prouse, supra; United States v. Brignoni-Ponce, supra, 422 U.S. at 882-83, 45 L. Ed. 2d at 617.

These decisions are not dispositive of the issue presented here, but they provide guidelines for balancing the public interest in capturing fleeing felons against the Fourth Amendment interests of a motorist detained by a temporary checkpoint or roadblock. Also instructive is the following language from Justice Jackson's dissent in Brinegar v. United States, 338 U.S. 160, 183, 93 L. Ed. 1879, 1894, 69 S. Ct. 1302 (1949).

> If we assume, for example, that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.

[1] Well defined safeguards are essential to protect the public against indiscriminate use of roadblock searches. A useful guideline is provided by the Model Code of Pre-Arraignment Procedure 110.2(2) (Proposed Official Draft, 1975) which states that a

> law enforcement officer may, if
>
> (a) he has reasonable cause to believe that a felony has been committed; and
>
> (b) stopping all or most automobiles, trucks, buses or other such motor vehicles moving in a particular direction or directions is reasonably necessary to permit a search for the perpetrator or victim of such felony in view of the seriousness and special circumstances of such felony, order the drivers of such vehicles to stop, and may search such vehicles to the extent necessary to accomplish such purpose. Such action shall be accomplished as promptly as possible under the circumstances.

(Italics ours.) 3 W. R. LaFave, Search and Seizure 9.5(a), at 141 (1978).

We approve this standard and construe the "reasonably necessary" language to limit the use of roadblocks to circumstances where there is a reasonable likelihood of success. The time elapsed or the availability of alternative paths of escape could render a roadblock unreasonable. Furthermore, the information that a serious felony has recently been committed and that suspects fled in a particular direction must be reliable. See 3 W. R. LaFave, Search and Seizure 9.5(a), at 141-44 (1978).

Under such circumstances, the momentary intrusion on the traveling public and the brief opening of the car trunk are reasonable even though the very nature of the procedure means that individualized

suspicion is absent and the scope of the search is broader than the detention allowed in Martinez-Fuerte. This type of roadblock and search is nonetheless more akin to the fixed checkpoint in Martinez-Fuerte than to the random stops in Brignoni-Ponce and Prouse. There is no unbridled discretion to establish roadblocks, and any danger of harassment is minimized by the probable cause requirement, the limited scope of the search and the other limits on the authority to use this procedure. The existence of probable cause to believe a felony has been committed justifies the greater intrusion of a limited search of each car for suspects.

Although we approve the use of roadblocks in proper cases, we must keep in mind that "the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry . . ." Davis v. Mississippi, 394 U.S. 721, 726, 22 L. Ed. 2d 676, 681, 89 S. Ct. 1394 (1969). Roadblocks to capture fleeing fleeing suspects,[1] therefore, can only be upheld in cases of the highest emergency. The safeguards we have listed are essential to preserve the protections of the Fourth Amendment.

In the present case, the officers had probable cause to believe a serious felony had been committed. Information about the nature of the crime and the means of flight had been reliably reported by the victim. This information was coupled with special circumstances which justified the officers' action at the ferry dock: the crime was violent; it was highly likely that the felons were on the

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[1]Our opinion does not address the issue of the legality of roadblocks to check all traffic for violations of the traffic laws. See Delaware v. Prouse, 440 U.S. 648, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979).

ferry; and there was only one means of departing the ferry. There was, therefore, a reasonable likelihood of success and a minimal intrusion on the traveling public. This roadblock and search for suspects was proper.

Silvernail next challenges the validity of the consent to search his car. Because we hold the search of the trunk to be a reasonable search for suspects, we need not decide whether Silvernail voluntarily consented to that search. We have carefully examined the entire record and have found the subsequent written consent to a complete search of the car to be voluntary. State v. Johnson, 16 Wn. App. 899, 559 P.2d 1380 (1977).

Silvernail next contends he was in custody when the officer requested the keys. He argues the request was a question designed to elicit a testimonial response which required a Miranda warning. State v. Dennis, 16 Wn. App. 417, 558 P.2d 297 (1976). We disagree.

[2] The request for the keys to the trunk was an attempt to use reasonable means to search for suspects. It was not designed to elicit a testimonial response and Silvernail's unexpected voluntary admissions were not the product of police questioning. No Miranda warnings were required. See State v. Rodriguez, 20 Wn. App. 876, 582 P.2d 904 (1978); cf. State v. Dennis, supra (a request designed to elicit a testimonial act).

JURY INSTRUCTIONS

The court correctly instructed the jury in part that first-degree burglary requires the State to prove "the defendant or another participant in the crime charged was armed with a deadly weapon or assaulted a person." RCW 9A.52.020. Silvernail

contends the trial court erred by not also instructing that an accomplice must be found legally accountable for the conduct of another before he can be found guilty. State v. Baylor, 17 Wn. App. 616, 565 P.2d 99 (1977); RCW 9A.08.020.

[3] Silvernail's argument misconstrues the State's case against him. Unlike State v. Baylor, supra, this is not a case where the State attempted to prove Silvernail was an accomplice as now defined in RCW 9A.08.020(3). No accomplice instruction was required because the State merely proved he was guilty of an offense which included, as one alternative element, certain acts by another participant in the crime. RCW 9A.52.020.

Silvernail's next contention turns on the evidence that during the burglary, he did not hold the gun. He contends the jury should have been instructed that only those persons actually armed with a firearm during the offense can be subject to special findings under RCW 9.41.025 and 9.95.040. Alternatively, he argues the jury must be instructed to find that he was an accomplice before deciding the firearm and deadly weapon issues. State v. Briggins, 11 Wn. App. 687, 524 P.2d 496 (1974).

[4] Both of Silvernail's contentions are without merit. Under State v. Willis, 5 Wn. App. 441, 487 P.2d 648 (1971), he is deemed armed if another accused who participated in the same offense is armed. While Willis was premised, in part, on former RCW 9.01.030, the passage of RCW 9A.08.020 did not change the rule. Willis was also premised on the observation that the intent of the deadly weapon and firearm statutes applies with equal force to all participants in a crime. We believe this reasoning to be sound because the danger to human life is at least as great when several

participants decide to use a deadly weapon.[2]

Silvernail's alternative contention fails because he misreads the holding of State v. Briggins, supra. It does not require an accomplice instruction. It merely approves the use of one where challenged by the accused as confusing. All that is required is an instruction that one is deemed armed if another participant in the offense is armed.

APPLICATION OF RCW 9.41.025

Silvernail contends the "rule of lenity" precludes enhancement of punishment under RCW 9.41.025 because possession of a deadly weapon is an element of first-degree burglary. State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978).

[5] Workman did not establish a constitutional rule, and the State, therefore, contends Silvernail may not raise this issue for the first time on appeal. We disagree. A trial court acts in excess of its jurisdiction if it imposes a sentence contrary to law. State v. Loux, 69 Wn.2d 855, 420 P.2d 693 (1966); State v. Luke, 42 Wn.2d 260, 254 P.2d 718 (1953), cert. denied, 345 U.S. 1000 (1953). An issue relating to the trial court's jurisdiction may be raised for the first time on appeal. State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1952); RAP 2.5. This appeal was pending when Workman was decided, and Silvernail is entitled to

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[2]We do not have to address the issue of an accused's liability where he has no knowledge of a coparticipant's possession of a weapon. There was no evidence from which the jury could have found Silvernail was unaware of the gun. Silvernail supplied the gun and it was fired during the burglary.

the benefits of that decision. State v. Miles, 24 Wn. App. 430, 601 P.2d 971 (1979).[3]

The State next argues that because possession of a deadly weapon is not a necessary element of burglary, the Workman rule does not apply. State v. Foster, 91 Wn.2d 466, 589 P.2d 789 (1979); State v. Gross, 23 Wn. App. 319, 597 P.2d 894 (1979).

The State cannot rely on State v. Foster, supra, because unlike first-degree burglary, the second-degree assault charge in that case does not have the possession of a deadly weapon as one of its possible elements. A "deadly weapon" as defined in RCW 9.95.040 or RCW 9A.04.110(6) is not necessary to the proof of any of the means of committing second-degree assault. RCW 9A.36.020.

In State v. Gross, supra, we dealt with first-degree rape. Possession of a deadly weapon is a possible means of elevating rape to first degree. Former RCW 9.79.170(1)(a). We disallowed enhancement of punishment because the defendant was charged only under section (1)(a). We noted that no blanket rule can be adopted for every case because when there are alternative means of committing the offense, the use of RCW 9.41.025 depends upon the elements charged.

[6] Where the legislature defines alternative means of elevating the degree of a crime (and thereby enhances punishment) and one of those means can also increase punishment under RCW 9.41.025, an ambiguity arises as to the legislature's intent. That ambiguity can be avoided by not alleging the

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[3]We express no opinion on the retroactive application of Workman in the context of petitions for post-conviction relief.

possession of a deadly weapon as one means of committing the crime. State v. Gross, supra. Here, several means of elevating the offense to first degree were charged. The resulting ambiguity should be resolved in favor of lenity. Simpson v. United States, 435 U.S. 6, 55 L. Ed. 2d 70, 98 S. Ct. 909 (1978); State v. Workman, supra. Under the information filed by the State in this case, RCW 9.41.025 cannot be used to enhance the punishment of first-degree burglary. Cf. State v. Gross, supra.

The judgement is affirmed except for the finding pursuant to RCW 9.41.025. That finding must be stricken and the case remanded for resentencing.

SWANSON, A.C.J., and WILLIAMS, J., concur.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GARY LEROY SILVERNAIL, Appellant.	)	NO. 6598-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, GARY LEROY SILVERNAIL, having filed his motion for reconsideration herein and the court having determined that it should be denied; Now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same hereby is, denied.

DATED this 7th day of February, 1980.

S/ Herbert A. Swanson

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PETITIONS FOR REVIEW 1021

State, Respondent, v. Silvernail, Petitioner, No. 46889. Petition for review of a decision of the Court of Appeals, January 14, 1980, 25 Wn. App. 185. Denied April 3, 1980.